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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-937

JOHN L. ZELKER, Superintendent, Green Haven Correctional Facility,

Petitioner,

against

CARL M. ROBINSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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RESPONSE NOT PRINTED

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JOHN L. ZELKER, Superintendent, Green Haven Correctional Facility,

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CARL M. ROBINSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, the Superintendent of Green Haven Correctional Facility, Stormville, New York, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the case of *United States of America ex rel. Carl M. Robinson* v. *John L. Zelker*. The judgment was entered on September 29, 1972. On October 18, 1972, the Court of Appeals declined to rehear the matter *en banc*. On November 27, 1972, the Court stayed its mandate, pending disposition of the matter by this Court.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is not yet reported and is annexed hereto as Appendix "A". The opinion of the United States District Court for the Southern District of New York is not yet reported and is annexed hereto as Appendix "B".

Jurisdiction

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code § 1254(1). The judgment of the Court of Appeals was entered on September 29, 1972 *reversing* the denial of respondent's petition for a writ of habeas corpus by the United States District Court for the Southern District of New York and remanding the matter for a hearing on the issue of whether the eyewitness based his in-court identification of respondent on factors independent of a prior station-house identification. On October 18, 1972, the Court declined to rehear the matter or rehear the matter *en banc*.

Questions Presented

1. Whether or not a criminal proceeding within the meaning of *Kirby* v. *Illinois* is commenced by the issuance and execution of a pre-indictment arrest warrant?

2. Whether or not a suspect, arrested on a warrant, is entitled to the presence of counsel at a show-up conducted the day after the crime is committed but before he is either indicted or arraigned?

Statement of the Case

Respondent is presently serving an indeterminate sentence of from 8 years, four months to twenty-five years fo

the crimes of robbery in the first degree, grand larceny in the second degree, possession of a weapon, and assault in the third degree. He was convicted on March 20, 1971 following a jury trial in New York County, New York. The judgment of conviction was affirmed by the Appellate Division (*People* v. *Robinson*, 36 A D 2d 690 [1st Dept. 1971]); and on April 7, 1971, leave to appeal to the New York Court of Appeals was denied.

Respondent then sought federal habeas corpus relief in the United States District Court for the Southern District of New York, claiming that his judgment of conviction was the product of a pre-trial identification procedure that was conducted in violation of his right to counsel; and in an impermissible and suggestive manner, contrary to his rights under the Sixth and Fourteenth Amendments to the Constitution. Other objections to his conviction were also raised, including claims of unlawful suppression of evidence and failure to afford him a preliminary hearing on probable cause as denying him rights under the Fifth and Fourteenth Amendments to the Constitution.

The crimes of which respondent was convicted arose out of events occurring on May 2 and 3, 1968. On May 2, 1968, respondent appeared at the White Plains, New York office of the Hertz Car Rental Corporation and filled out and signed a car rental agreement for a 1968 white Mercury Cougar.

On the morning of May 3, 1968, Daniel Greenberg, an operator of a parking lot on West 46th Street in the Borough of Manhattan in the City of New York, walked from his business establishment to a branch of the Manufacturer's Hanover Trust Company located on Eighth Avenue and West 44th Street. He went to the bank to get change for use in the conduct of his business. He obtained eight ten-dollar rolls of quarters and six five-dollar rolls of dimes at the bank, placed them in a blue airlines bag and began to walk back towards his business establishment.

As Mr. Greenberg stepped into the street on 46th Street, he heard someone shout, "I'm going to shoot". Thereupon he suddenly felt a severe pain in his back and fell to the pavement, unable to get up. While he lay there in severe pain and seriously injured, he saw a young, black man pick up the blue airline bag containing the eighty dollars in cash. This man, according to the testimony of several eyewitnesses, crossed Eighth Avenue, got into a white Cougar, standing at the Northeast corner of Eighth Avenue and West 46th Street, and drove off.

By pure coincidence, a police department tow-truck operated by Officer Ferdinand Voltaggio was standing at the corner of West 46th Street and Eighth Avenue waiting for the light to change. According to Voltaggio's testimony, he heard the shot, and saw respondent standing over the stricken Mr. Greenberg. Respondent then picked up the bag and crossed in front of the tow-truck approximately twenty to twenty-five feet away from the truck. Voltaggio was momentarily distracted by the horn of the white Cougar. According to his uncontradicted testimony however, Voltaggio had a substantially unobstructed view of respondent for approximateily 14 seconds.* Voltaggio chased the white Cougar for two blocks to West 48th Street, and then cross-town to Sixth Avenue. There, the Cougar and the tow-truck were halted by midtown, midday traffic. At this point, respondent got out of the passenger side of the Cougar, ran toward Sixth Avenue and continued running. While escaping, respondent looked directly at the tow-truck which was standing one car behind the Cougar. Consequently, Voltaggio, who had already emerged from the truck, had a second opportunity to view

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* It should be noted in passing, however, that the Court of Appeals, reduced this to approximately three seconds. The Court's majority took judicial notice that a sprinter would take only one and one-half seconds to cross this distance (p. 22, *infra*).

respondent for a two to three second period from a distance of approximately 15 feet. Voltaggio, according to his testimony, ran over to the Cougar and arrested the two remaining occupants of the car. He did not chase respondent.

A search of the vehicle conducted incident to arrest revealed a blue airline bag containing approximately eighty dollars in dimes and quarters, some in rolls bearing the name "Manufacturer's Bank"; and in the glove compartment, a box of .22 calibre shells and a Hertz car-rental agreement. The rental agreement was conceded to have been signed by respondent.

That evening a hearing was conducted at the Criminal Court of the City of New York to determine whether a warrant for respondent's arrest should issue. At this hearing, testimony was taken from the investigating officer, Detective Matthew Horan, a Miss Odessa Chambers, and Officer Voltaggio. At the hearing, Detective Horan testified to the events surrounding the crime and said that he had obtained a description of the escaped man from Officer Voltaggio. Horan also testified that he found the Hertz car rental agreement signed by respondent, giving a Portchester, New York address. Miss Chambers, with whom respondent was then living and whom he subsequently married, also testified to respondent's description. After this, Patrolman Voltaggio testified. He essentially reaffirmed his prior statements made to Detective Horan. He said that the robber was a "brown-skinned" Negro, approximately 5-7 or 5-8 and was wearing a dark jacket with, according to the testimony, lights pants.

On the basis of this *ex parte* hearing, and the filing of an "information upon oath" Judge Bloom issued a warrant for respondent's arrest pursuant to former New York Code of Criminal Procedure § 150, subd. 2.

On the day following the assault, May 4, 1968, Detective Horan, upon the warrant issued by the Court, found and arrested respondent. Immediately after arrest, he was advised of his rights under *Miranda* v. *Arizona,* 384 U.S. 436 (1966).

That evening, Patrolman Voltaggio received a phone call and was asked to come to the station house. He was not informed of the reason therefor. When Voltaggio arrived, he was told to see Detective Horan. Voltaggio entered the squad room, whereupon Horan asked if he knew anyone in the room. Respondent was at that time seated beside Horan, and Voltaggio immediately identified him as the individual that had shot Daniel Greenberg.

Subsequently, on May 5, 1968 respondent was arraigned at the Criminal Court of the City of New York and bound over for proceedings by the Grand Jury. Voltaggio was present at the arraignment.

At trial, Voltaggio testified for the People and identified respondent as Greenberg's assailant. No objection was made at trial to Voltaggio's in-court identification. Voltaggio was extensively cross-examined by respondent's trial counsel concerning the basis for his in-court identification, and the circumstances surrounding his identification at the station house. While there are minor inconsistencies between the description of respondent at the hearing on the warrant and at trial, it must be remembered that more than twenty-one months had elapsed between the crime and the on-the-scene viewing by Voltaggio and the precinct-house show-up conducted the next day on the one hand and the trial on the other. Nevertheless, Voltaggio insisted under retained counsel's cross-examination that respondent was the man he saw stand over Greenberg, take the airline bag and escape into the Cougar.

Respondent took the stand in his own defense and testified that he did indeed go to the Hertz car-rental agency and rent the white Cougar. He stated, however, that he

did not rent the car for himself but for a long-time friend of his, one J. B. Ray. According to respondent's testimony, he rented the car for "Ray" because "Ray" was not a Portchester resident and respondent thought that only a resident could rent a car. According to respondent's testimony, the Pyle brothers (the two men arrested in the car), Ray and himself returned to Portchester in the rented car, the other three let him out and then they drove off. Respondent stated that he never saw the car after that.

Respondent further offered a substantially unsupported alibi that he was in bed on the morning of May 3, that he rose at approximately 11:00 a.m., and that he borrowed a friend's car and spent the day at an amusement park. On the way home, according to his testimony, he stopped at the home of a reative and did not return home until between 9 and 10 at night.

On the basis of this evidence, the jury found respondent guilty of all charges enumerated in the indictment. The Court entered a judgment of conviction on the verdict and sentenced respondent to a term of from 8⅓ to 25 years.

After exhausting his direct appeals through the New York State Courts, respondent filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York. The District Court (COOPER, J.) without a hearing, denied the writ and dismissed the petition. The Court found, after scrutinizing the entire record before it, that Voltaggio's in-court identification of Robinson had a clear and independent origin.

Between the issuance of the District Court order and the hearing of the appeal, in the United States Court of Appeals for the Second Circuit, this Court decided *Kirby* v. *Illinois*, 406 U.S. 682 (1972) which limited the requirement of counsel to identifications that take place after a criminal proceeding has formally begun and the defendant has been formally charged. The Second Circuit, however, in an unwarranted and superficial reading of this Court's holding in

Kirby found it not to be applicable because the arrest warrant for the felonies charged respondent, had been issued based on an "information upon oath". The Court remanded the matter to the District Court for a hearing on the question of whether or not officer Voltaggio had an independent basis for his in-court identification of respondent.

By so holding, the Circuit Court not only violated this Court's express holding in *Kirby,* but further exacerbated the situation by construing New York law in such a manner so as to be in direct conflict with the New York Court of Appeals. There is also no doubt but that had the Circuit Court used the proper standard—the standard announced by this Court in *Stovall* v. *Denno,* 388 U.S. 293 (1967)—Voltaggio's testimony would clearly be admissible. *Neil* v. *Biggers,* —— U.S. —— (Docket No. 71-586, December 6, 1972).

Reasons For Granting The Writ

1. The holding of the Court below that respondent was entitled to counsel at a pre-indictment, pre-arraignment show-up is in direct conflict with this Court's decisions.

The crux of the decision of the court below was that an arrest, upon a warrant, constitutes the commencement of an adversary criminal proceeding within the meaning of this Court's decision in *Kirby* v. *Illinois,* 406 U.S. 682 (1972).

The procedure used in New York for issuing a warrant for a suspect's arrest is set forth in Code of Cr. Proc. §§ 148 *et seq.** Under this procedure, an "information" (now denoted in a felony case, as a "felony complaint", CPL § 100.10, subd. 5) must be laid before a Magistrate, charging the commission of an offense. Thereupon, the Magistrate must examine *the informant* or prosecutor and any witnesses he may produce. If, after such examination, the

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* See Criminal Procedure Law §§ 140.10, *et seq.*

Magistrate is satisfied that the offense complained of has been committed and there is reasonable ground to believe that the accused has committed such offense, he must issue a warrant. Code of Cr. Proc. § 150, subd. 2.*

The court below reasoned that because an arrest warrant is issued upon a document denoted as "information on oath" any confrontations subsequent thereto require the presence of counsel. The court seized upon the holding of the majority of this Court that the right to counsel accrues "at or after the initiation of adversary criminal proceedings, whether by way of formal charge, preliminary hearing, indictment, information or arraignment". 406 U.S. at 689.

It is submitted that the court below failed to take cognizance of the fact that New York differs significantly from the majority of states by providing that a criminal proceeding in a felony case can only be begun by Grand Jury indictment. This right is not only a right guaranteed by the New York State Constitution, but is also a jurisdictional requirement of those courts in New York having jurisdiction to try felony cases. N.Y. Const., Art I, § 6; Code of Cr. Proc. § 4. As such, it is a non-waivable requirement.** *People* v. *Bellinger,* 269 N.Y. 265 (1935); *Simonson* v. *Cahn,* 27 N Y 2d 1 (1970). See Dash, "The Indicting Grand Jury: A Critical Stage?", 10 Amer. Cr. L. Rev. 807, n. 24 at 812-813.

The commencement of a criminal proceeding, as defined by this Court, is the point at which the government has committed itself to prosecute, the point at which the government's and defendant's adverse positions have solid-

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* See CPL § 120.20, subd. 1.

** Other states requiring a grand jury indictment as a condition precedent to the commencement of a felony prosecution are: Hawaii, Kentucky, Maryland, Massachusetts, Mississippi, Tennessee, Texas, and West Virginia.

ified and the point at which the defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. *Kirby* v. *Illinois, supra,* 406 U.S. at 689. See *Powell* v. *Alabama,* 287 U.S. 45, 66-71 (1932); *Spano* v. *New York,* 360 U.S. 315 (1959); *Massiah* v. *United States,* 377 U.S. 201 (1964).

It is respectfully urged that the point at which the criminal process begins must be defined as a point where the State obtains the power to prosecute the defendant for the offense charged, for it is only then that the government has the ability to commit itself to prosecute. *People* v. *Stockford,* 24 N Y 2d 146 (1969). Indeed, under New York law, a defendant is not even permitted to plead to a charged felony until the Grand Jury indicts. *People ex rel. Battista* v. *Christian,* 249 N.Y. 314 (1928); *Simonson* v. *Cahn, supra,* 27 N Y 2d at 4. By contrast, most jurisdictions allow a prosecutor to proceed, at his option, by way of indictment or prosecutorial information* or require a Grand Jury indictment but permit a defendant to waive it.**

While this Court has held that an accused has the right to have counsel present at any in-custody interrogation by the state whether before or after indictment, such right is not an adjunct of the Sixth Amendment right to counsel. It is designed to give scope and meaning to the Fifth Amendment protection against being forced to incriminate one's self. However, this Court has specifically held that

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* The majority of states fall into this category, including Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, Vermont, Washington, Wisconsin and Wyoming.

** The states in this category include Alabama, Alaska, Delaware, Georgia, Illinois, Maine, New Hampshire, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina and Virginia.

the Fifth Amendment right extends only to information of a communicative nature not to a suspect's physical being. The right to counsel *qua* counsel, that is within the meaning of the Sixth Amendment does not attach until a defendant has been formally charged by whatever means a jurisdiction uses to so charge—indictment, or information. *Kirby* v. *Illinois, supra; United States* v. *Wade,* 388 U.S. 218 (1967); *Miranda* v. *Arizona,* 384 U.S. 436 (1966); *Schmerber* v. *California,* 384 U.S. 757 (1966); *Massiah* v. *United States,* 377 U.S. 201 (1964).

The distinction between the pre-indictment and post-indictment period referred to above is far from recent and dates to 1932 where Mr. Justice Sutherland defined, for all time, the outer limits of the right to counsel as beginning at the time a defendant is formally arraigned on a charge. *Powell* v. *Alabama, supra,* 287 U.S. at 57. See *Massiah* v. *United States, supra,* 377 U.S. at 205-206; *White* v. *Maryland,* 373 U.S. 59 (1963); *Gideon* v. *Wainwright,* 372 U.S. 335 (1963); *Hamilton* v. *Alabama,* 368 U.S. 52 (1961); *Spano* v. *New York, supra.*

The inescapable conclusion drawn from the foregoing analysis is that not only did the court below violate the specific holding of this Court in *Kirby, supra,* but also unwarrantedly extended the Sixth Amendment right to counsel to a point to which this Court has specifically declined to go.

2. The decision appealed from represents a construction of state procedure that violates the holdings of the state courts.

The holding that the issuance of a warrant of arrest based upon the filing of an information on oath is a commencement of a criminal proceeding for Sixth Amendment purposes is in direct conflict with the holdings of the New York Court of Appeals.

It is a basic and sound rule that the role of the Federal courts in Federal habeas corpus is one that is limited to

deciding questions of constitutional dimension. The courts cannot and do not sit in habeas corpus proceedings, to decide questions of state law. They must take state law as it is found and by applying it, decide whatever federal questions are presented. *Perez* v. *Ledesma*, 401 U.S. 82, 84 (1971); *Milton* v. *Wainwright*, 407 U.S. 371, 377-378 (1972). The Second Circuit, by holding that the filing of an information upon oath in a felony case commences a criminal proceeding, has directly, albeit *sub silentio*, overruled a long-standing decision of the New York Court of Appeals on a question of state procedure.

The Second Circuit relied principally on § 144 of the New York Code of Criminal Procedure (see CPL § 100.10 subd. 5), which states that a criminal proceeding is commenced for the purposes of the statute of limitations by the filing of an information charging an offense and the issuance of an arrest warrant. Yet, the New York Court of Appeals in *People* v. *Stockford*, 24 N Y 2d 146 (1969) has specifically dealt with the question of an information in a felony case. It held, basing its opinion largely upon *Massiah* v. *United States*, *supra*; and *Spano* v. *New York*, *supra* that "this stage of the proceeding has not yet been fully equated to that which would exist where after arraignment and the appearance of counsel in a court the police attempted to question a defendant, not in the presence of that counsel". 24 N Y 2d at 148. The Court in *Stockford* also declined to equate such a situation to an arrest after indictment. It specifically stated (24 N Y 2d at 148):

> "Nor may an information used to obtain an arrest warrant be regarded as the equivalent of the formal triable document *which initiates a misdemeanor prosecution.*" [Emphasis added]

See U.S. ex rel. Rosner v. *Warden*, 329 F.Supp. 673 (E.D. N.Y., 1971).

Although the procedure used in the instant case was governed by the provisions of the now superseded Code of Criminal Procedure, New York's current Criminal Procedure Law still uses the same basic system. CPL §§ 120.10, 120.20, 120.90. It is clear, therefore, that the information used in the instant case is not the formal charge that this Court contemplated in *Kirby,* but merely a basis upon which a local judge is able to determine whether there is probable cause to arrest; and that the Circuit Court, by holding otherwise, has exceeded its jurisdiction by refusing to defer to the State Court on a question of State Law.

3. The Court of Appeals, insofar as it draws an arbitrary distinction between arrests with and without a warrant, violates the expressed policy of this Court.

This Court, in innumerable decisions has stated that the use of a warrant procedure to effect a seizure of a person, is to be preferred over a non-warrant arrest. Use of such a procedure assures a disinterested inquiry into the reasons why a police officer believes that a crime has been committed, and also assures that the person whose custody is sought has committed the crime. Based upon this inquiry, the magistrate can determine if probable cause exists. When there is no probable cause, the effect of such inquiry is to protect the person from the ignominy of being seized at their homes by the police, being taken away in a police car to the local jail, and thereafter having to litigate the issue. The arrest warrant and hearing also preserves for the prosecution, evidence of high probative value, which may be used either in the state courts on motions to suppress, or, years later, in collateral federal habeas corpus proceedings.

This Court, in *United States* v. *Ventresca,* 380 U.S. 102 (1965), implied that the warrant procedure is not to be discouraged by a "grudging or negative attitude by reviewing courts" 380 U.S. at 108, which would discourage

police officers "from submitting their evidence to a judicial officer before acting". *id.* Similarly, in *Aguilar* v. *Texas,* 378 U.S. 108, at 111 (1964), this Court, relying on *United States* v. *Lefkowitz,* 285 U.S. 452 (1932) and *Jones* v. *United States,* 362 U.S. 257 (1960), stated:

> "An evaluation of the constitutionality of a search warrant should begin with the rule that 'the informed and deliberate determinations of magistrates empowered to issue warrants, . . . are to be preferred over the hurried actions of officers . . . who may happen to make arrests'. *United States* v. *Lefkowitz,* 285 U.S. 452, 464."

This view was most recently reaffirmed by this Court in *United States* v. *Harris,* 403 U.S. 573 (1971). In the majority opinion, the Chief Justice admonished reviewing courts not to judge by overtechnical standards, affidavits underlying the issuance of search warrants. *id.* at 577. The Court adopted the reasoning of *Ventresca, supra,* and stated that reviewing courts would do well to heed its advice. *id.*

Following the foregoing analysis, the New York Court of Appeals in *People* v. *Stockford, supra,* 24 N Y 2d at 148, reasoned:

> "If the issuance of an ordinary warrant of arrest by a magistrate on complaint is to be treated for all purposes as such a formal commencement of the criminal action as to preclude any inquiry by the police unless there is a lawyer present (as after an arraignment in court), it would draw an unnecessarily complicated difference between an arrest on warrant and an arrest on probable cause without a warrant."

Yet this is precisely what the Second Circuit undertook to do. The consequences of its decision would obviously be to discourage the police from using the warrant procedure wherever an alternative is available.

Finally, the result mandated by the Second Circuit bases the requirement of counsel on coincidental aspects of a suspect's arrest. Surely, the Constitution did not intend that the requirement of counsel at a pre-trial, pre-indictment, pre-arraignment confrontation turn on the fine distinction of having a police officer determine probable cause or having a magistrate determine probable cause.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York, December 21, 1972.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 814—September Term, 1971

(Argued June 16, 1972 Decided Sept. 28, 1972

Docket No. 72-1224

United States ex rel. Carl M. Robinson,

Petitioner-Appellant

v.

John L. Zelker, Superintendent, Green Haven Correctional Facility, Stormville, New York,

Respondent-Appellee

Before KAUFMAN, HAYS and OAKES, *Circuit Judges.*

Appeal from an order of the District Court for the Southern District of New York, Irving Ben Cooper, *Judge,* denying without a hearing state prisoner's application for a writ of habeas corpus.

Reversed and remanded with directions.

Stephen A. Marshall, New York, New York, for Petitioner-Appellant.

Maryellen Weinberg, Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Assistant Attorney General), for Respondent-Appellee.

Appendix A.

OAKES, *Circuit Judge:*

This is another in a series of recent cases in this circuit[1] involving an in-court identification claimed to have been tainted by suggestive procedures used. *United States* v. *Wade,* 388 U.S. 218 (1967); *Gilbert* v. *California,* 388 U.S. 263 (1967). The case is different from some in that the identification witness was himself a police officer. Since *Wade* and *Gilbert* have been held by *Kirby* v. *Illinois,* —— U.S. ——, 40 U.S.L.W. 4607, 4609 (June 7, 1972), to give a right to counsel ". . . only at or after the time that adversary judicial proceedings have been initiated . . . ," this case presents the nice question whether the issuance of a warrant of arrest under former section 144 of the New York Code of Criminal Procedure[2] amounts to such an initiation. The court below denied without a hearing a pro se application for a writ of habeas corpus under 28 U.S.C. § 2241. Appellant had been convicted in the state court of robbery in the first degree, grand larceny in the third degree, possession of a weapon, and assault in the first degree.[3]

A recital of the facts indicates that there is a modicum of doubt whether, without the damaging identification, appellant would have been found guilty. The crime took place in broad daylight in Manhattan at 11:30 a.m. on May 3, 1968. Daniel Greenberg had just obtained a blue airline bag of coins and coin-rolls totalling some $80 from the Manufacturers Hanover Trust Company at 8th Avenue and 44th Street to take to his parking lot on West 46th Street. While walking back to the lot, on the south side of 46th Street, west of 8th Avenue, he was viciously shot in the back by an assailant who picked up the bag with the money. One eyewitness, an engineer named Schumann, saw the assailant hold the gun (which Schumann correctly recognized as a small calibre pistol), grab the bag and run to and enter a white car. Another passerby, Barcelo, observed a white Mercury Cougar stop on a green light at the intersection

of 8th Avenue and 46th Street. The usual city horn blowing and "a commotion" on the street followed, and Barcelo then saw a man entering the Cougar, which at that time was stopped on the northeast corner of 8th Avenue, across 46th Street. Neither Schumann nor Barcelo identified appellant at the trial.

The witness who did identify appellant was Patrolman Ferdinand Voltaggio. He was an officer assigned to the Parking Enforcement Squad, and at the moment of the crime happened to be located in a tow truck stopped at the 46th Street stop light on 8th Avenue, in the furthest west traffic lane. Voltaggio heard the shot and saw the assailant, then standing over Greenberg's body some 50 feet away, pick up the bag, put the gun in his belt and run toward the tow truck. The assailant ran about 20 feet in front of Voltaggio across 8th Avenue, jumped into the white Cougar, with two men in it, and drove north on 8th Avenue. Voltaggio gave pursuit, the vehicles going through red lights at Broadway and then 7th Avenue after the Cougar turned right on 48th Street. The Cougar became stuck at 6th Avenue in typical mid-day, mid-town, cross-town traffic, and Voltaggio jumped from his truck and started after the assailant who had jumped out of the car. The assailant escaped, but Voltaggio apprehended the two men in the car, the Pyle brothers.

Patrolman Voltaggio testified at trial that he had seen the assailant's face "about 14 seconds" when he was running across 8th Avenue in front of the tow truck (although it should be noted that a man running only 10 miles per hour, half the speed of a sprinter, can run about 15 feet per second), and that he also saw the assailant get out of the Cougar at the 6th Avenue traffic jam, look at the officer and run back down 48th Street toward 8th Avenue.

The car turned out to be a rented Mercury and the airline bag with the money was in it. The glove compart-

ment contained a box of .22 shells and, highly incriminating, a Hertz rental agreement under which the car had been leased to appellant the evening before. Appellant, however, subsequently took the stand on his own behalf to testify that he had signed the rental agreement on behalf of a North Carolina schoolmate and friend of his, one J. B. Ray, at White Plains, with the Pyle brothers present, using Ray's money as a deposit. The purpose of the rental was to enable Ray to travel south, appellant claimed, and after the evening of the rental he had not seen Ray, the Pyle brothers or the white Cougar again.

On the night of the crime, City Detective Horan went to the appellant's house and brought Odessa Chambers, the woman with whom appellant was living and subsequently married, to the station house. There, at a hearing in chambers on an application for a complaint and warrant, Horan, Miss Chambers, and Officer Voltaggio all testified, in the presence of each other.[4]

Detective Horan testified at the arrest hearing as to the events surrounding the robbery and shooting of Greenberg, that he had a description obtained from Patrolman Voltaggio, and that the Pyle brothers who had been apprehended claimed that they rented the car with appellant but did not implicate him in the robbery.[5] Odessa Chambers testified that she had seen the Pyles with appellant the day before, and that he had left the house about 6:30 in the morning.[6] She gave a description of him as being 4 or 5 inches taller than her own 5 feet 2 inches, stating that he was "brown skinned" and when last seen was wearing a black suit with a blue tie and light shirt, black shoes, no hat, but that he could have been wearing a "light colored pair of pants, too." Patrolman Voltaggio then testified about what he had seen and regarding the chase. He gave a description of the robber as "brown

skinned, Negro, he was about 5-7 or 5-8, he had a dark jacket and, I believe, he had on light pants" and no hat. Upon the strength of the foregoing Judge Bloom directed that a complaint issue charging appellant with the crimes of robbery in the first degree, assault in the first degree and possession of a weapon as a felony.

The evening of the day after the crime Detective Horan went to Port Chester, arrested appellant, and brought him back to the 18th Precinct in Manhattan where he was booked. A few hours later Voltaggio was called to go to the "18th Squad Room." He there found Detective Horan and appellant as the only people in the room, conversed with Horan briefly and then told Horan, "Yeh, that's the fellow that did the shooting." No lineup was conducted, nor was any attorney for appellant present at this time.

The first question we have is whether "adversary judicial proceedings" had been "initiated" within *Kirby* v. *Illinois, supra,* so as to entitle appellant to counsel under *United States* v. *Wade, supra,* and *Gilbert* v. *California, supra,* at the "show-up" or confrontation by Officer Voltaggio the night of appellant's arrest. Mr. Justice Stewart, speaking for a plurality of four Justices in *Kirby,* made it clear that the right to counsel accrues ". . . at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." 40 U.S.L.W. at 4609-10. The Chief Justice, concurring both in the plurality opinion and separately, agreed "that the right to counsel attaches as soon as criminal charges are formally made against an accused and he becomes the subject of a 'criminal prosecution.'" 40 U.S.L.W. at 4610.

Here the arrest warrant itself commanded that appellant be brought forthwith before the Criminal Court "to answer the said charge, and to be dealt with according to

law." These were formal criminal proceedings, for the warrant had been signed by a judge based on an "information upon oath" that appellant did commit the crimes of assault, robbery and possession of a dangerous weapon. This being true, *Wade* required counsel at the show-up, for we see no distinction based on the chance fact that the identifying witness was also a police officer. Time was not of the essence, a lineup could have been arranged and there appeared to be no "substantial countervailing policy considerations" against requiring the presence of counsel as suggested in *Wade*. 388 U.S. at 237; *see United States ex rel. Cummings* v. *Zelker*, 455 F.2d 714, 716 (2d Cir. 1972). Advice to appellant about his rights at the time of his arrest does not suffice. *United States* v. *Ayers*, 426 F.2d 524, 527 (2d Cir.), *cert. denied*, 400 U.S. 842 (1970). Moreover, there is a question whether the show-up was "unnecessarily suggestive and conducive to irreparable mistaken identification" within *Stovall* v. *Denno*, 388 U.S. 293, 302 (1967); *see United States ex rel. Phipps* v. *Follette*, 428 F.2d 912, 914-15 (2d Cir.), *cert. denied*, 400 U.S. 908 (1970). *But see United States ex rel. Anderson* v. *Mancusi*, 413 F.2d 1012 (2d Cir. 1969) (one man show-up not per se impermissible). In view of the *Wade* violation, however, we need not pass upon this question here.[8]

The principal question then is whether Officer Voltaggio's identification had an independent source, that is, was based upon ". . . observations of the suspect other than the [show-up] identification." *United States* v. *Wade*, *supra*, 388 U.S. at 240. There is substantial evidence in the record that the in-court identification was independent of the show-up in origin—the witness' original opportunity for observation in terms of visibility conditions was excellent, in terms of distance good and in terms of time ample, if the officer's testimony is taken at face value. *See United States ex rel. Cummings* v. *Zelker*, *supra*; *United States ex rel. Phipps* v. *Follette*, *supra*, 428 F.2d at 915.

There was also a relatively short interval—36 hours—between the original event and the questioned confrontation at the squad room, thereby lessening the likelihood that the initial imprint will have dimmed and the second image be the one relied upon for the in-court identification. *See United States ex rel. Bisordi* v. *Lavalle,* Docket No. 71-2112, slip op. 2869, 2876 (2d Cir., May 1, 1972).

On the other hand, Voltaggio's initial opportunity for observation was probably not so longlasting as the 13, 14 or 15 seconds to which he testified or the 17 seconds to which the State alludes in its brief, since the assailant was running and in but 4 seconds at a moderate speed[9] rather readily could have passed the tow truck parked on the west side of the avenue; by Voltaggio's testimony the assailant was some 25 feet away at that time, and Voltaggio's attention was also attracted to the Cougar on the other side of the avenue by the horn blowing. And on the second occasion, the view at the traffic jam when the assailant jumped out of the Cougar, the officer first said his view was 2-3 seconds, and later, when the judges said, "He said in 3 seconds," said "3 seconds."[10] Moreover, his descriptions at the time of the arrest hearing and at the time of trial differ from one another: while the former description included "brown skinned" and "light pants," but no mention of hair style or moustache, the latter read "light skinned," "dark pants," an "Afro haircut" with "a part in it," and a "pencil striped moustache." Schumann, the enginner, who saw the event and it will be recalled did not identify appellant as the assailant, testified that the assailant's hair was "neat" and that he had on dark pants.

The issue of taint is not made less difficult when it is realized that before Officer Voltaggio made his show-up identification he heard Odessa Chambers' description of the witness and Detective Horan's statement that Chambers' and Voltaggio's descriptions at the arrest hearing

"[match] well with the one Hertz gave us." That there was a degree of uncertainty about the officer's identification would seem to follow from appellant's version of the "show-up," if believed, *viz.*, that he had to appear twice before a one-way mirror before Voltaggio appeared. It also follows to some extent from the fact that Detective Horan at some time, apparently at the arraignment, showed Voltaggio a photograph—the necessity for which does not appear.

Suffice it to say that there is evidence in the record that would justify a finding either way on the issue of "independent source," but it will be recalled that the State had the burden of proof by "clear and convincing" evidence under *Wade*, 388 U.S. at 240; *see United States ex rel. Cummings* v. *Zelker, supra*, 455 F.2d at 716-17. Thus we are required under *United States ex rel. Rivera* v. *McKendrick*, 448 F.2d 30 (2d Cir. 1971), *cert. denied*, 404 U.S. 1025 (1972), to reverse for an evidentiary hearing on the question whether there was impermissible taint to the in-court identification—unless we were to conclude that any error was harmless in any event within *Harrington* v. *California*, 395 U.S. 250 (1969), and *Chapman* v. *California*, 386 U.S. 18 (1967).

It is true that appellant rented the car used in the crime and that the jury disbelieved his alibi story about renting it for "J. B. Ray." From the transcript the trial judge evidently disbelieved appellant on the basis of Odessa Chambers' testimony at the pre-arrest hearing,[11] but it will be recalled she, there, spoke of a fourth man—"There were four of them. It's not just three." It hardly follows inexorably from the fact that the car was rented by appellant, however, that he was the assailant.[12] He would have to have been pretty stupid, as his counsel argued in closing, to have left the rental agreement with his name and address in the glove compartment of a white Cougar to be

used as the getaway car in a daylight robbery.[13] Moreover, the trial judge indicated to the jury three times that the witness Schumann had identified appellant as Greenberg's assailant, correcting himself twice but not the third time. *Cf. United States ex rel. Rivera* v. *McKendrick, supra,* 448 F.2d at 35 ("potential for prejudicial error" increased by prosecutor's and judge's statements, absent evidence, of selection by witnesses of defendant's photograph out of a group of photographs). With Voltaggio's identification the sole identification tying appellant to the crime, and especially in the light of Schumann's omission to make an identification despite close-up observation and a detailed description, we cannot say that any error in respect to the identification evidence was harmless.

Accordingly we reverse and remand for an evidentiary hearing by the court below on the question of independent source, in accordance with *Wade* and its requirements. 388 U.S. at 240.

Reversed and remanded.

Appendix A.

FOOTNOTES

[1] *E.g., United States ex rel. Bisordi* v. *LaVallee,* Docket No. 71-2112, slip op. 2869 (2d Cir., May 1, 1972); *United States* v. *Harrison,* Docket No. 71-1752, slip op. 2775 (2d Cir., Apr. 25, 1972); *United States* v. *Fernandez,* 456 F.2d 638 (2d Cir. 1972); *United States ex rel. Rivera* v. *McKendrick,* 448 F.2d 30 (2d Cir. 1971), *cert. denied,* 404 U.S. 1025 (1972); *United States ex rel. Phipps* v. *Follette,* 428 F.2d 912 (2d Cir.), *cert. denied,* 400 U.S. 908 (1970). *Cf. United States* v. *Madison,* 458 F.2d 974 (2d Cir. 1972); *United States* v. *Magnotti,* 454 F. 2d 1140 (2d Cir. 1972); *United States ex rel. Springle* v. *Follette,* 435 F.2d 1380 (2d Cir. 1970), *cert. denied,* 401 U.S. 980 (1971).

[2] Section 144 of the New York Code of Criminal Procedure (as amended in 1967), which was in effect at all times here relevant (the New York Code of Criminal Procedure was repealed and replaced by the New York Criminal Procedure Law in 1971) provided that:

> *A prosecution is commenced,* within the meaning of any provision of this act which limits the time for commencing an action, *when an information is laid before a magistrate charging the commission of an offense and a warrant of arrest is issued by him,* or when an indictment is duly presented by the grand jury in open court, and there received and filed. (Emphasis supplied.)

It is difficult to perceive any basis upon which commencement of a prosecution for the purposes of the statute of limitations is not commencement for other purposes as well, including the commencement of adversary judicial criminal proceedings within *Kirby. Kirby* states, 40 U.S.L.W. at 4610, and presumably the dissent in this case would concede, that the filing of an indictment is the initiation of "adversary criminal proceedings." The issuance of a warrant of arrest upon an information is the exact equivalent of the filing of an indictment and, in fact, they are explicitly equated by Section 144. Under New York law, the degree of prosecutorial discretion to proceed to trial under either appears to be equivalent; for example, under the statutes now in effect both can be dropped only with court approval, *compare New York Criminal Procedure Law,* § 170.40 (McKinney, 1971) *with id.* § 210.40, and there is every reason to suppose that this has always been the case. *Cf.* New York Code of Criminal Procedure, § 671 (McKinney, 1958). Under both "a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Kirby,* 40 U.S.L.W. at 4610.

Appendix A.

[3] Appellant was convicted on Feb. 18, 1970, after a jury trial before Justice Frank in the Supreme Court, New York County, and on the robbery count sentenced from 8 years 4 months to 25 years, with concurrent lesser terms on the other counts.

[4] The hearing minutes apparently were not before the court below when it denied the writ.

[5] Neither of the Pyles testified in court. Much of the trial court transcript is taken up with colloquies in which they were going to testify but were warned by the court to engage a lawyer and that anything they might testify to would be held against them. The claim is made on this appeal that the Pyles were intimidated but we put no stock in it; the Supreme Court Judge, Harry B. Frank, was, we believe, properly warning them that they could be charged with being accessories, and he properly refused to grant immunity.

[6] Odessa Chambers Robinson did not testify at the trial, though her testimony at the application for a complaint and warrant did run contrary to appellant's later testimony as to his time of departure, where he said he was going, and whether he kept the car overnight. She did say, however, that "There were four of them. It's not just three," and this to some extent substantiates appellant's own story as to "J. B. Ray."

[7] Appellant's version of what happened in the squad room differs from Voltaggio's. Appellant claims that he was interrogated and singly displayed before a one-way mirror by the police, that he requested to see and talk with an attorney but was told that he could have one only after he told the police what they wanted to know, and that it took two trips before the mirror before Police Officer Voltaggio entered the room. Officer Voltaggio was present at the arraignment on the following day, March 5, and testified at trial that he was shown a single photograph of appellant by Detective Horan who stated that it was a photograph of Robinson, apparently at the arraignment.

[8] Nor need we pass on the *Gilbert* point, that testimony as to pretrial identification made under a *Wade* violation is in and of itself to be excluded.

[9] Voltaggio, who is 5 feet 8 inches in height and weighed 225 pounds, testified he did not chase the assailant because "I felt he was a little faster than me in running. . . ." On redirect the prosecutor asked him whether he was a "track man or runner of any kind," to which an objection was sustained after a negative answer.

[10] Voltaggio's testimony is somewhat self-contradictory. On the one hand he testified that at the traffic jam at 6th Avenue the assailant ran toward 8th Avenue and thus *westerly,* so as to pass Voltaggio. Indeed, the trial judge subsequently inquired whether the assailant was 20 feet away "when he passed you" and received an affirmative answer. Subsequently on cross, however, he testified that the assailant ran *easterly.* We put no emphasis on this at all, however, since his original reference to 8th Avenue probably was a typical simple mistake of a witness and his failure to correct the judge on the inquiry inadvertent.

[11] The Court:

. . . .

In any event, she did testify and you showed me her testimony. This testimony was given prior to any legal status of his wife so she no longer can claim that lips are sealed because she is his wife.

I believe that the testimony that she can offer clearly indicates that everything this defendant has stated on the stand is absolutely perjurious and concocted—thus I will call that.

I think she is a necessary witness for the prosecution and I direct you to have your detective bring her in here tomorrow as a witness.

[12] *Cf. United States* v. *Garrett,* 371 F.2d 296, 299 (7th Cir. 1966) (defendant Andrews), *modified sub nom. Simmons* v. *United States,* 390 U.S. 377 (1968).

[13] On the other hand, "Ray" (and, perhaps, the Pyle brothers) would have had every reason to attempt to cast suspicion upon appellant by leaving the rental agreement with his name on it in the getaway car.

Appendix A.

Hays, Circuit Judge, dissenting:

I cannot agree with the majority's conclusion that "adversary judicial criminal proceedings," within the meaning of *Kirby* v. *Illinois*, 40 U.S.L.W. 4607 (U.S. June 7, 1972), had been begun in this case at the time of the pretrial show-up, entitling Robinson to counsel at that show-up in accordance with *United States* v. *Wade*, 388 U.S. 263 (1967). In *Kirby* the Court said:

> "The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. *For it is only then that the Government has committed itself to prosecute, and only then that the adverse positions of Government and defendant have solidified.* It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable." (Footnote omitted; emphasis added.)

Kirby v. *Illinois, supra*, at 4610.

Here the only judicial action taken against Robinson was the issuance of a warrant of arrest. He was not even arraigned until the day after the show-up. The majority, in its footnote 2, cites former N.Y. Code Crim. Proc. 144 for the proposition that the warrant commenced the prosecution within the meaning of *Kirby* v. *Illinois*. However, that section says only that "[a] prosecution is commenced, *within the meaning of any provision of this act which limits the time for commencing an action*, . . ." when a warrant is issued. It seems clear that such a warrant is

not a point at which "the Government has committed itself to prosecute, and . . . the adverse positions of Government and defendant have solidified."

Though the majority does not reach the point because of its disposition of the case, I do not see any need, on the facts of this case, to hold a hearing on the question of whether the identification procedures used were "so unnecessarily suggestive and conducive to irreparable mistaken identification that [Robinson] was denied due process of law." *Stovall* v. *Denno*, 388 U.S. 293, 302 (1967). See *United States ex rel. Phipps* v. *Follette*, 428 F.2d 912 (2d Cir.), cert. denied, 400 U.S. 908 (1970); *United States ex rel. Anderson* v. *Mancusi*, 413 F.2d 1012 (2d Cir. 1969). Nor do I see any merit in the other points raised by appellant.

Appendix B

Memorandum Decision of District Court

UNITED STATES OF AMERICA ex rel. CARL M. ROBINSON
v. J. P. CONBOY — PRO SE 71 Civ. 1997

Motion denied in all respects. Petitioner's claim that he was identified by an unlawful procedure is not sufficient to warrant the relief sought, for we find after scrutinizing the entire trial record before us that in-court identification had a clear and independent origin. See *United States* v. *Wade*, 388 U.S. 218 (1967); *Chapman* v. *California*, 386 U.S. 18 (1967).

As for petitioner's contention that the identification of him was erroneous: that centered on the issue of credibility which was resolved adversely to petitioner by the jury; it is not subject to collateral attack here.

Petitioner's claim that the prosecution unlawfully suppressed evidence and that he was denied the effective assistance of counsel is absolutely without merit. See *United States* v. *Currier*, 405 F.2d 1039 (2d Cir. 1969).

His claim that he was not afforded a fair and impartial trial certainly is not supported by the record. In any event, no federal habeas corpus question is raised with respect to a judge's charge, even when it is assumed he committed error warranting reversal of the conviction by a state appellate court, except where the judge's instructions deprive the defendant of the fundamentals of a fair trial. *Buchalter* v. *New York*, 319 U.S. 427 (1943). Furthermore, petitioner did not raise this point on appeal and thus has not exhausted his state remedies. 28 U.S.C. § 2254.

SO ORDERED:

New York, N. Y., December 15, 1971

ILLEGIBLE
U. S. D. J.